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In the

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1213

STATE OF CALIFORNIA DEPARTMENT OF INDUSTRIAL RELATIONS, DIVISION OF INDUSTRIAL WELFARE; CALIFORNIA INDUSTRIAL WELFARE COMMISSION,
Petitioners,

vs.

HOMEMAKERS, INC., OF LOS ANGELES,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

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Petitioners,

vs.

Homemakers, Inc., of Los Angeles,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals for the Ninth Circuit

Brief for Respondent in Opposition

QUESTION PRESENTED

The question presented for review is whether the District Court was correct in rendering, and the Court of Appeals for the Ninth Circuit was correct in affirming, a declaratory judgment that the portions of the California Women's Protective Laws requiring special overtime pay for women are invalid by reason of being in conflict with the Civil Rights Act of 1964.

STATUTES AND ORDER INVOLVED

The principal statutory provisions are Sections 1350 and 1350.5 of the California Labor Code, in Division 2

("Employment Regulation and Supervision"), Part 4 ("Women and Minors"), Chapter 3 ("Working Hours"), Article 1 ("Female Employees").

Section 1350 generally prohibits females to be employed more than eight hours during any day or forty-eight hours in any week, except as provided in Section 1350.5. The latter section in general declares female employees covered by the federal Fair Labor Standards Act may be employed up to ten hours during a day or up to fifty-eight hours in one week, provided they are compensated at one and one-half times the regular rate of pay for the excess over eight hours per day or forty per week.

The administrative order in question is Industrial Welfare Commission Order 5-68, entitled "Wages, Hours, and Working Conditions for Women and Minors in the Public Housekeeping Industry." It defines as "employee" any employed woman or minor. Section 3 thereof prohibits employment of any woman more than eight hours per day or more than five days per week unless paid one and one-half times the regular rate of pay for the excess on the sixth day. This order recites it was adopted pursuant to above provisions of Part 4 ("Women and Minors").

The Civil Rights Act of 1964 makes unlawful employment practices which, *inter alia,* discriminate, or limit, segregate or classify employees adversely, because of sex. (86 Stat. 109, 42 U.S.C.A. § 2000e-2.)

State laws, generally, may not require or permit an unlawful employment practice and may be invalid if inconsistent with any purposes or provision of the Act. (78 Stat. 262, 268, 42 U.S.C.A. §§ 2000e-7, 2000h-4.)

STATEMENT OF THE CASE

Respondent was threatened by petitioners with enforcement of state statutory and regulatory provisions respecting hours and conditions of work for females and, believing them to be invalid, commenced this action in the United States District Court for the Northern District of California to secure a judgment of their validity or invalidity. Respondent's motion was granted by the Court on the determination that the statutes and orders were in conflict with the Civil Rights Act of 1964 and, therefore, invalid.

Plaintiff is an employer as that term is used in the Act and supplies the services of its employees in the homes or other premises of its customers. The services rendered are, for the most part, those required by persons who are sick or incapacitated or involve domestic work. The nature and location of the employment results in difficult record-keeping problems respecting hours and wages, often involving complicated questions of fact, which, however, were not raised in this proceeding.

Petitioners are the state agencies responsible for the administration and enforcement of the state laws brought in question regulating women's hours of work and compensation.

The most significant portion of these laws purports to require California employees to pay women employees at special premium rates as a condition of the State's permission to them to work more than the maximum hours otherwise imposed by the State.

ARGUMENT

Summary of Argument

The determination of the District Court and the Ninth Circuit that these California Women's Protective Laws are invalid as being in conflict with the Civil Rights Act of 1964 is clearly correct. The writ requested should not be granted because, in addition to this, the single decision assertedly in conflict is subject to being distinguished. Inde-

pendently of this, no momentous legal issues are present and the practical effect of the decision is limited. The actual importance of the entire question was lessened in the course of the litigation when the California Legislature eliminated a major portion of the sex-based distinctions. This significant development will, petitioners and respondent agree, obviate the conflict between the state and the federal laws adjudged to exist by the courts below.

I. The Practical Effects of the Judgment Are Limited.

The actual, practical effects of the judgment are of far less moment and consequence than petitioners suggest to the Court.

Their arguments leave the impression that this judgment would eliminate payment of premium overtime compensation in California to women (and, maybe, even men). This is not true.

In the first place, many arrangements for such premium pay are based upon private agreement of employer and employee without the intervention of governmental mandate. Others, of course, result from collective bargaining agreements. Neither type, needless to say, must follow the laws here in question in being sexually slanted and, indeed, if they did, they would be subject to invalidation under the Civil Rights Act.

Most importantly, premium pay for overtime work will continue by virtue of the requirements of the Fair Labor Standards Act. This federal law generally prescribes payment at the rate of time and one-half for work in excess of the familiar 40-hour week. It is significant, respondent believes, to what extent petitioners ignore the impact of this important law, particularly, as they stated below, since it covers about four out of five nonsupervisory employees.

Petitioners no doubt seek to avoid this because the federal law applies equally to men and women and, also, because its pervasive application in California refutes petitioners' assertions of harsh and disruptive results in the State if this women's protective law joins the others in being declared invalid.

The elimination of the three provisions in question will be beneficial and accord with national policy and, indeed, that of the State.

Section 1350 of the California Labor Code is concededly invalid,[1] and the sole statutory requirement of overtime for women is found in Section 1350.5. It, of course, has similarly been adjudged invalid by the courts below. By its own terms, this section applies only to employees covered by the Fair Labor Standards Act. As a practical matter, therefore, the loss of Section 1350.5 is hardly momentous, since the very persons covered by it are covered by the overtime provisions of the federal law.

The final provision in question, the Order of the Industrial Welfare Commission, applies to employees not covered by Section 1350.5 and, therefore, to employees not covered by the Fair Labor Standards Act. Since the California Legislature has subsequent to the commencement of this litigation amended the Commission's statutory authority and duty from that of regulating the working conditions of women and minors to that of all employees, of both sexes, its orders will hereafter comport completely with the congressional statement of national policy in

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1. *Rosenfeld v. Southern Pacific Co.* (9th Cir. 1968) 444 F.2d 1219. Following this decision, the Division, petitioner herein, announced it would no longer enforce the maximum hours limitations in sections 1350 and 1350.5 of the Labor Code and section 3 of the Commission's orders. These are the identical sections which were challenged in the present action.

applying equally to the sexes without the sexual distinction previously prescribed.

As a result of this, a denial of the petition will leave California law exactly where it should be: male and female employees will be treated equally with respect to overtime under both the Fair Labor Standards Act and, where that is inapplicable, under the Orders of the Industrial Welfare Commission.

Petitioners' claims as to the "critical importance" of this decision are certainly overblown for another fundamental reason. It is clear California is going out of the business of "protecting" women in this fashion. Previously, other decisions of the federal courts in California have declared invalid other aspects of the California Women's Protective Law. On the aspect of it presently before the Court, the combination of this decision as it now stands and the substantial amendment of the law by the California Legislature would seem to make this rather clear. So, it may be said this case has "assumed such an isolated significance" that it would hardly bring to the Court the substantial questions which would be appropriately cognizable under the discretionary writ sought. See *Rice v. Sioux City Memorial Park Cemetery* (1955) 349 U.S. 70, 76, 75 S.Ct. 614, 618. With the day of the Women's Protective Law so definitely over, scores of such laws either having been repealed or declared invalid by the courts or the enforcing agencies of the states themselves, this type of case arguably verges on the academic or episodic. *Id.* at 349 U.S. 74, 75 S.Ct. 616.

While it is not believed this case is technically mooted, the very substantial accomplishments of the California Legislature in eliminating sexual distinctions in the State's statutory scheme certainly would support a denial of the writ on the basis the question now is obviously of a much

lesser public importance. See *District of Columbia v. Sweeney* (1940) 310 U.S. 631, 60 S.Ct. 1082.[2]

Finally, the comparatively narrow scope of the State overtime laws is apparent when viewed in terms of the coverage in California of the federal overtime law: the latter limits the State provisions' application as a practical matter to daily overtime during the first 40 hours of each work week; thereafter, the federal law simply takes over and the State provisions may be regarded as redundant.

II. The Decision Assertedly in Conflict May Be Distinguished.

Petitioners' heavy emphasis upon an asserted conflict between the opinion of the Ninth Circuit and that of the Eighth Circuit in *Hays v. Potlatch Forests, Inc.* (8th Cir. 1972) 465 F.2d 1081, is understandable and, in fact, if one were limited to the statement of the latter as set forth in petitioners' petition, the conflict might well be regarded as direct and irreconcilable, as petitioners assert. However, a reading of the actual opinions reveals significant differences which readily and properly permit the allegedly conflicting decision to be distinguished.

The Court of Appeals, in the first place, expressly refused in *Hays* to consider the important issue that the overtime laws before it were intended to limit the hours women could work and, thus, constituted a discrimination against them. (465 F.2d at 1082.) The reason stated for this was that the question was not raised below. Here, the argument has been presented and, indeed, greatly emphasized that the California overtime provisions are part and parcel of a statutory scheme of imposing maximum hours upon

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2. Petitioners apparently agree, having represented to the Court of Appeals that the legislative amendments "will undoubtedly obviate the 'conflict' between federal and state laws found to exist by the District Court." (Appellants' Reply Brief, p. 2.)

women and, under settled authority, are invalid for that reason.

Secondly, the employer in *Hays* was paying overtime to both male and female employees. (318 F.Supp. 1368 at 1370, 465 F.2d at 1083.) By contrast, no such finding was made below and, indeed, petitioners flatly assert to the contrary that no premium pay was given for overtime hours at all. (Petition, p. 4.) While the accuracy of petitioners' statement may be questioned, they certainly will not object to it being accepted at face value, and doing this results in significantly different factual situations in the two cases.

Another distinguishing factor was that the employer in *Hays* had conceded it must pay the same overtime to males as it did to females. Respondent need not disagree with this general statement in suggesting it was determinative there and not even present as an issue here. Not only had it been agreed the employer already was paying overtime to females pursuant to the Arkansas statute, but the judgment of the court and what the employer was in fact already doing were remarkably similar. Understandably, therefore, and in the words of the District Court, "granting the validity of plaintiff's concession," which the judge was moved to remark had been made by the employer "presumably advisedly," the court simply found no basis to grant the relief sought by the employer in commencing the action.

Opinions are necessarily to be read in connection with the facts to determine whether there is, indeed, a conflict. *White v. Aronson* (1937) 302 U.S. 16, 58 S.Ct. 95. If the propriety of the decisions assertedly in conflict depend upon facts, issues or circumstances peculiar to only one of the two cases, there is no real conflict. Certainly, if two decisions are capable of being harmonized or distinguished, there is not the "real and embarrassing conflict" required

for issuance of this writ. *Layne & Co. v. Western Well Works* (1923) 261 U.S. 387, 393, 43 S.Ct. 422, 423.

A principal contention of petitioners is that the remedy employed in *Hays* was proper, but that the disinclination of the courts in California to apply the same "remedy" was not. Analytically, this hardly supports their argument that there is a conflict, since if there is anything flexible and peculiarly subject to individual variation, it is remedies. Further, the particular facts stipulated or found must be regarded in deciding the propriety of the specific action taken by a court.

III. The Decision Is Clearly Correct.

A. The Equal Pay Act Cannot Be Used to Perpetuate Women's Protective Laws.

The invalidity of these women's protective laws as written has been virtually conceded by petitioners, but they would save them, despite their otherwise clear and irreconcilable conflict with the Civil Rights Act, through a judicial revision of startling scope and consequence: where the laws speak of "women", petitioners would simply have them read "men and women". This, the District Court refused to do, and the Ninth Circuit affirmed the correctness of that refusal.

The "extension of the benefit" theory, which petitioners believe should be followed to accomplish this turnabout, cannot properly be utilized where its consequence, as here, is not only to ignore, but indeed, to reverse the undoubted legislative intent.[3]

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3. The Attorney General previously, respondent believes, had a clearer view of the intent and effect of these laws, and they are set forth in two published opinions of the Attorney General. In the first, it is explained that since it is for the benefit of the health and welfare of women they not be employed too long, the Legislature can absolutely limit employment of women to a specified number of

The inappropriateness of rewriting the California laws was clear to the courts below, and a reiteration of the arguments concerning them would necessarily involve a detailed reargument of the merits. Respondent will avoid this, but will briefly respond to the new emphasis by petitioners on the Equal Pay Act, made as supposed support for this device and this desired result.

That the resolution of a serious and substantial legal issue is not dependent upon the granting of this petition is illustrated by the fact petitioners seem to limit themselves to raising but one real question of law and, then, at one and the same time, describe a factual situation which makes it inapplicable.

The inapplicable issue, interesting in the abstract as it may be, is the relationship of the Equal Pay Act to the Civil Rights Act, Title VII (Petition, pp. 10-11). The factual context the petitioners present to the Court is that previously alluded to, namely, the non-payment of any overtime to any employees (Petition, p. 4). Whatever may

hours *or can require payment of overtime premium pay to women in order to keep down the number of hours women work.* 12 Ops. Cal. Atty. Gen. 319 (12/17/48). This protective intent and the all-too-accurate assessment of overtime laws as an important method of limiting maximum hours of work permitted to women was directed at California's general statutory and regulatory scheme, including Labor Code Section 1350 and the orders of the Commission.

In his second opinion, the Attorney General has stated the legislative intent in enacting Labor Code Section 1350.5 as being to broaden employment opportunities of women by permitting them to work longer hours. 50 Ops. Cal. Atty. Gen. 141, 143 (12/21/67). This concession is very probably correct, but it is, at the same time, fatal to any defense of the state law's validity because the federal law simply does not permit the states to arrogate to themselves the right so to grant or withhold employment opportunity to that portion of their population which is female.

While it is evident the Attorney General is capable of change, the laws before the Court are the same described above. "[T]he passage of time cannot change clear and unequivocal language of a statute." *Monte Vista Lodge v. Guardian Life Ins. Co. of America* (9th Cir. 1967) 384 F.2d 126, 128.

be said about either the merits of such a practice or the accuracy of the petitioners' assertion, their statement of the case clearly makes the Equal Pay Act quite inapplicable here.

Since the Equal Pay Act Law only mandates equality of pay, and by itself does not require payment at any special rate or, of course, payment of overtime, where the employer does not pay overtime as prescribed by a state women's protective law requiring overtime, the only compulsion of law for overtime would be the women's protective law. It is, of course, basic to respondent's position that such a provision is invalid and, furthermore, that the spirit and purpose of the Equal Pay Law itself, just as is true of Title VII, is affronted by State sex-based wage laws. The policy of the two federal laws being the same, it is submitted the Equal Pay Law will not save sexually discriminatory state protective laws where the Civil Rights Act would require they be invalidated.[4]

In sum, petitioners' statement is that respondent is *not* "paying a wage rate differential" and they do not, therefore, assert there is either any violation of the Equal Pay Act or any prohibited reduction of wages in order to cure that nonexistent violation. Consequently, the Act is simply not relevant to the sole question of whether the California Women's Protective Law conflicts with Title VII.

As some part of this non-issue of the Equal Pay Act, petitioners perceive yet further conflict in the appropriateness of the remedies available and utilized under Title VII.

4. It hardly need be belabored that Congress spoke of "paying a wage rate differential" based on sex (77 Stat. 56, 29 U.S.C.A. § 206d), nor that the law has nothing to address itself to if different payments are not made to the two sexes for equal work. In the specific area of overtime payment, the regulations are abundantly clear that there can be no prohibited discrimination unless one of the sexes is paid something the other is not (29 F.R. 5548, § 800.162).

Petitioners' position is they would not have selected the "remedy" of the Ninth Circuit, which was to affirm the invalidity of the California Women's Protective Law.

It is perfectly true, and hardly necessary to cite any great number of cases as authority, that the federal courts have broad remedies open to them in the implementation and enforcement of the Civil Rights Act. The injunctive and other equitable relief authorized under Title VII, however, is appropriate where the courts find a prohibited employment practice by an employer (or a union). Here, of course, agencies of the State of California, once again, have been found to be administering laws which conflict and are superseded by the Civil Rights Act. When that fundamental is apprehended, the appropriateness of the result coming from the two courts below is quite clear. Certainly, the courts' "plenary and broad remedial powers" were to secure compliance with Title VII and not, as the State would have it here, perpetuate a statutory scheme of employment practices based on sexual classifications. See *Alexander v. Gardner-Denver Co.* (1974) 415 U.S. 36, 44, 94 S.Ct. 1011.

B. The EEOC's Views Were Neither Disregarded nor Controlling.

The EEOC now believes *some* women's protective laws, including, as it happens, the ones here in question, should be read to apply to men, and this having been done, that they should not be regarded as invalid.

The opinion of each court below expressly commented on the Commission's guidelines. They were, therefore, not disregarded as petitioner suggests, but merely found wanting as persuasive authority requiring the modification of state substantive law as urged by petitioners. (Petition, pp. iv, x.)

Petitioners complain that the District Court and the Court of Appeals were not sufficiently deferential to the views of the Equal Employment Opportunity Commission. (Cf. Judgment, Petition, p. x ["The Court agrees that great deference should be given EEOC guidelines and interpretive comments . . ."].) The thinking of the Commission and its staff should certainly be considered, but it clearly is not controlling on the courts.

To be sure, courts commonly express their "deference" for administrative interpretations of governing statutes. Indeed, this Court has done so in connection with this statute and this commission. *Griggs v. Duke Power Company* (1971) 401 U.S. 424, 91 S.Ct. 849, *Espinoza v. Farah* (1974) 414 U.S. 86, 93-95, 94 S.Ct. 334, 339-340.

It is important, however, to recognize that the courts qualify or condition such statements, and in suitable instances reject what they regard as erroneous actions by the agencies involved. Thus, in *Griggs,* the Court strongly qualified its statement by limiting it to where the Act and its legislative history support the Commission.

In *Espinoza,* after noting the reversal of position by the EEOC in its guidelines, the Court declared, "The Commission's more recent interpretation of the statute in the guideline relied on by the District Court is no doubt entitled to great deference [citations], but that deference must have limits, where, as here, application of the guideline would be inconsistent with an obvious congressional intent . . . Courts need not defer to an administrative construction of a statute when there are 'compelling indications that it is wrong.'" 414 U.S. at 94, 94 S.Ct. at 339.

The correct rule, it would seem, is that the agency's regulations will be followed when they are correct and will not be when they are incorrect. It is respondent's contention,

of course, that in adopting the guidelines in question, the Commission acted contrary to the legislative intent and purpose, was inconsistent even with its own previous actions and, in a word, was wrong.

A further and fundamental reason why the Commission's interpretive regulations should not be considered binding is found in the authorizing statute itself, where Congress limited the Commission's authority to "suitable *procedural* regulations to carry out the provisions of the sub-chapter." 78 Stat. 265, 42 U.S.C.A. § 2000(e)12(a) (emphasis added).

C. Women's Protective Laws Conflict With the Provisions and Purposes of the Civil Rights Act of 1964.

That the decision is clearly correct necessarily involves at least brief reference to the merits argued and decided below.

National policy prohibits sexual discrimination in employment, and this is true whether it be required or permitted under a state law or an unlawful employment practice of an employer. That this policy contrasts sharply with that accepted but a relatively few years ago undoubtedly accounts for the fact that women's protective laws have been brought before the courts in substantial number, with the general result that they have been found to exhibit as a common characteristic and rationale sexual distinctions in employment practices now proscribed by Title VII.

The general policy, if not in the context of the specific question here involved, has been enunciated by this Court. See *Frontiero v. Richardson* (1973) 411 U.S. 677, 93 S.Ct. 1764, *Stanton v. Stanton* (1975) ..... U.S. ....., 95 S.Ct. 1373. The highest court in California has strongly declared this policy. *Sail'er Inn, Inc. v. Kirby* (1971) 5 C.3d 1, 10, 95 Cal. Rptr. 329, 334 [". . . tender and chivalrous concern

for the well-being of the female half of the adult population cannot be translated into legal restrictions on employment opportunities for women"]. Respondent submits this statement, and the actions of the California Legislature in eliminating gender-based distinctions in the State law, more accurately represent the policy of the State than that suggested in the petition.

The federal courts sitting in California have with great consistency adhered to the national policy expressed in Title VII. Indeed, this petition is but a continuing effort by petitioners which would, if eventually successful, unsettle much of the law developed in these various decisions. See *Rosenfeld v. Southern Pacific Co.* (1968) 444 F.2d 1219, *Local 246, Util. Wkrs. U. v. Southern California Edison Company* (1970) 320 F.Supp. 1262, *Schaeffer v. San Diego Yellow Cabs, Inc.* (1972) 462 F.2d 1002, *Burns v. Rohr Corp.* (1972) 346 F.Supp. 994.

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Dated: May 15, 1975.

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